

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ITV DIRECT, INC.,

Plaintiff,

V.

HEALTHY SOLUTIONS, LLC, et al.,

Defendants.

RELATED CASES

CIVIL ACTION NO. 04-CV-10421-JLT

**PLAINTIFF ITV DIRECT'S AND INTERVENOR-DEFENDANT DIRECT
FULFILLMENT, LLC'S OPPOSITION TO CAPPSEALS' PROPOSED ORDER**

Plaintiff and intervenor-defendant ITV Direct, Inc. and intervenor-defendant Direct Fulfillment, LLC (collectively, “ITV” or “Plaintiff”) hereby submit this opposition to the proposed order submitted by Intervenor Plaintiff Cappseals, Inc. (“Cappseals”) on April 8, 2005.

The order proposed by Cappseals seeks to prevent ITV from introducing any documents at trial that were not produced by April 5, 2005. The proposed order is contrary to the rulings of this Court at the Pretrial Conference held on April 5, 2005, in which this Court denied Cappseals' Motion for Sanctions seeking to prevent ITV from introducing any evidence as to its damages at trial, some of which has been deemed confidential by Judge O'Toole in another case pending in this court. See FTC v. Direct Marketing Concepts, Inc., C.A. No. 04-11136-GA ("FTC Action"). This Court also denied Cappseals' request that ITV's affirmative defenses be stricken, and instead held that ITV would not be able to introduce any documents at trial that did not contain a bates-stamp number.

As discussed at the Pretrial Conference before this Court, due to the fact that Judge O'Toole has not yet ruled on Cappseals' pending Motion for Access to Confidential Information,

ITV has not yet produced the financial report prepared for the FTC or any of the supporting work papers for that audit, all of which have been deemed confidential by the order of Judge O'Toole. See June 23, 2004 Preliminary Injunction Order, at 25 (O'Toole, J.) ("Such information gathered by and reports prepared by the accounting firm shall be designated as confidential information."). ITV has repeatedly represented that once Judge O'Toole rules on Cappseals' Motion for Access and presumably permits such disclosure by ITV, ITV will deliver the report and the underlying documentation to Cappseals.

If Cappseals' proposed order is entered by this Court, ITV has essentially been sanctioned for failing to produce documents that it cannot produce under the order of Judge O'Toole. The parties in the FTC action are appearing before Judge O'Toole for a hearing on April 11, 2005, and ITV expects that Judge O'Toole will address Cappseals' Motion for Access to Confidential Information at that time.

WHEREFORE, ITV requests that the Court enter the proposed order in the form that is attached hereto as Exhibit A.

Respectfully submitted,

ITV DIRECT, INC.

By their attorney(s),

/s/ Susan Gelwick

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